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No. 08-405

Supreme Court, U.S.
FILED
DEC - 9 2008
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CROSS COUNTRY BANK, INC.,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK, by ANDREW CUOMO, Attorney General of the State of New York,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

A provision of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1610(e), provides that TILA disclosure requirements for credit or charge card solicitations or applications supersede related state laws. The question in this case is:

> Whether state deceptive practices laws "relate" to TILA disclosure requirements such that the state laws are preempted by § 1610(e).

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SUPPLEMENTAL STATEMENT OF STATUTES AT ISSUE

New York General Business Law §§ 349-350 and New York Executive Law § 63(12) are reproduced in respondent's Supplemental Appendix.

STATEMENT

1. New York's Consumer Protection Act, New York General Business Law ("GBL") §§ 349 to 350-f-1, prohibits fraudulent or deceptive business practices; it is modeled after the anti-fraud provisions of the Federal Trade Commission ("FTC") Act, 15 U.S.C. § 45. *See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26 (1995). Enacted in 1970, it declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state," GBL § 349(a), and any "[f]alse advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state," GBL § 350. A separate law, enacted in 1951, authorizes the New York Attorney General to seek injunctive and other relief for repeated or persistent fraudulent business activities. N. Y. Exec. Law § 63(12).

2. The federal Truth in Lending Act ("TILA") requires, among other things, the disclosure of information in consumer credit transactions in order to promote the informed use of credit. *See* 15 U.S.C. § 1601 *et seq.* Since its enactment in 1968, TILA has preempted state laws "relating to the disclosure of information in connection with credit transactions," but only to the

extent of the state laws' inconsistency with TILA or its implementing regulations. 15 U.S.C. § 1610(a)(1); *see also* 12 C.F.R. § 226.28(a)(1). In 1988, TILA was amended to add disclosure requirements at the solicitation and application stage of open-end credit and charge cards. *See* Fair Credit and Charge Card Disclosure Act of 1988 ("FCCCDA"), Pub. L. No. 100-583, 102 Stat. 2960. The purpose of the amendments was to provide for detailed, uniform disclosures at an earlier stage in order to enhance credit shopping. *See* Truth in Lending; Credit and Charge Card Disclosures (Final Rule), 54 Fed. Reg. 13,855, 13,855 (Apr. 6, 1989). The FCCCDA requires the disclosure of information on credit and charge card applications and solicitations that describes the card's (i) annual percentage rate; (ii) annual and other fees, including membership fees, late fees, and over-the-limit fees; (iii) any grace period; and (iv) the balance calculation method. *See* 15 U.S.C. § 1637(c); 12 C.F.R. § 226.5a(b). The required disclosures must be clear and conspicuous and must be provided in a prescribed tabular form. *See* 15 U.S.C. §§ 1632 (a),(c), 1637(c); 12 C.F.R. § 226.5a(a)(2).[1]

The FCCCDA added a special preemption clause, 15 U.S.C. § 1610(e), which creates broader preemption for credit and charge card applications and solicitations than the general preemption provision at 15 U.S.C. § 1610(a)(1). The special preemption clause provides that the disclosure and tabular format requirements described above

> shall supersede any provision of the law of any State relating to the disclosure of information

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1. The FCCCDA also governs renewal notices for credit and charge cards. *See* 15 U.S.C. § 1637(d); 12 C.F.R. § 226.9(e).

> in any credit or charge card application or solicitation which is subject to [the disclosure requirements of 15 U.S.C. §§ 1637(c)], except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.[2]

15 U.S.C. § 1610(e); *see also* 12 C.F.R. § 226.28(d).

The Senate Banking Committee Report and House Conference Report accompanying the passage of the FCCCDA both conclude that § 1610(e) does not preempt state unfair or deceptive practices laws. The Senate Banking Committee Report states that § 1610(e) "applies to State credit card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. *Nor does it apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.*" S. Rep. No. 100-259, at 9 (1987),

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2. 15 U.S.C. § 1610(e) states, in its entirety:

> The provisions of subsection (c) of section 122 [15 USCS § 1632(c)] and subsections (c), (d), (e), and (f) of section 127 [15 USCS § 1637(c),(d),(c), and (f)] shall supersede any provision of the law of any State relating to the disclosure of information in any credit or charge card application or solicitation which is subject to the requirements of section 127(c) [15 USCS § 1637(c)] or any renewal notice which is subject to the requirements of section 127(d) [15 USCS § 1637(d)], except that any State may employ or establish State laws for the purpose of enforcing the requirements of such sections.

reprinted in 1988 U.S.C.C.A.N. 3936, 3945 (emphasis added). Similarly, the House Conference Report states:

> This section applies to State credit and charge card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. Nor does this section affect other State consumer laws regarding credit cards or charge cards, such as a State statute requiring banks in that State to offer a grace period.
>
> Moreover, this section does not affect any State law enacted or used to enforce the requirements of section 127(c) through (f). For example, *this section does not apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices*. Therefore, nothing contained in this section shall be construed to prevent a federal, state or local agency which enforces an unfair and deceptive acts or practices statute from requiring or obtaining the requirements of a specific disclosure beyond those specified in Section 127(c) in the settlement or adjudication of a specific case or cases. Thus, any State may employ or establish laws for the purpose of enforcing the Federal disclosure requirements.

H.R. Conf. Rep. No. 100-1069, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3951, 3960 (emphasis added).

Congress has delegated expansive power to the Board of Governors of the Federal Reserve System to explain, expand, or modify the statutory framework governing TILA. *See, e.g.*, 15 U.S.C. §§ 1637(c)(5), 1640(f). The Board executes this responsibility by promulgating and frequently revising Regulation Z, TILA's implementing regulation, *see* 12 C.F.R. pt. 226; by issuing opinions on preemption, *see, e.g.*, 12 C.F.R. § 226.28; and through Official Staff Interpretations of TILA and Regulation Z, *see* 12 C.F.R. pt. 226, supplement I. In this capacity, the Board has also stated repeatedly that § 1610(e) does not preempt state unfair or deceptive practices laws. For example, the Board's rulemaking accompanying its 1989 revisions to Regulation Z elaborates on the scope of preemption under § 1610(e):

> In addition, state laws regulating the substance of transactions subject to section 127 (c) or (d) are not preempted, nor are state laws preempted that regulate the form or content of the disclosure of information that is unrelated to the scope and content of information required to be disclosed under section 127 (c) or (d). Thus, for example, the following types of state laws are not preeempted: laws requiring card issuers to offer a grace period or prohibiting certain fees in credit or charge card transactions; laws such as retail installment sales acts and plain language laws, unless they regulate the disclosure of credit term information in credit and charge card applications, solicitations or renewal notices; laws requiring notice of a

> consumer's rights under antidiscrimination or similar laws; and laws notifying consumers about credit information available from state authorities. Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) *or of any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") also are not preempted.*

Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,864 (emphasis added). The Official Staff Interpretation of § 1610(e) repeats this conclusion. *See* 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3) ("[S]tate laws concerning the enforcement of the requirements of §§ 226.5a and 226.9(e) *and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted.*") (emphasis added).

3. Petitioner Cross Country Bank ("CCB") is a financial institution chartered by the State of Delaware. Pet. App. 2a.[3] It issues credit cards targeted at the sub-prime credit market, that is, consumers who generally would not qualify for credit under traditional underwriting guidelines. Pet. App. 2a. The Attorney General, on behalf of the People of the State of New York, initiated a proceeding against CCB on March 28, 2003, alleging fraud, deceptive business practices, false advertising, and illegal activities in the marketing and sale of CCB's credit card services, in violation of New

3. "Pet." refers to the Petition for a Writ of Certiorari. "Pet. App." refers to the Appendix to the Petition.

York Executive Law § 63(12) and General Business Law §§ 349 and 350. Pet. App. 2a.[4]

The People alleged that CCB's credit card solicitations had, among other things, deceived consumers as to the credit limits they would receive, the amount of available credit upon card initiation, and their enrollment in third-party membership benefits programs. For example, CCB told consumers that they were "pre-approved" for a credit limit "up to" either $2,500 or $1,000, but the credit actually provided was as low as $350, and in some cases the accumulation of initial fees — which were treated as charges against the available balance — immediately depleted available credit by 40% or more. Pet. App. 2a-3a. Moreover, unbeknownst to most consumers, CCB often automatically enrolled them in third-party membership benefits programs for which they were immediately assessed fees. Pet. App. 4a & n.5.

The People also alleged that CCB's solicitations for its "secured" card were fraudulent.[5] The advertisements for the secured card touted in large type on the banner "no late fees" and "no collection calls," but the fine print near the bottom revealed that such fees could be

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4. The Petition also alleged abusive collection practices by CCB's credit card servicer, Applied Card Systems, Inc., a corporation under common ownership and control with CCB. *See* Pet. App. 4a-5a, 58a-59a. ACS has not sought certiorari, and the collection claims are not at issue here.

5. The card was "secured" by funds on deposit in savings accounts maintained by CCB.

imposed and collection calls could be made in certain circumstances. Pet. App. 4a.[6]

By order dated February 11, 2004, the New York trial court dismissed all but two of CCB's affirmative defenses. Pet. 5a-6a.[7] In its motion to reargue the February 11 order, CCB asserted for the first time that TILA preempts the People's deceptive practices claims against CCB. Pet. App. 6a. On May 28, 2004, following oral argument, the trial court denied CCB's motion to reargue and rejected CCB's preemption claim. Pet. App. 6a.

On June 24, 2004, after reviewing "volumes of evidentiary proof," including more than 100 pages of applications and solicitation materials and more than 200 consumer complaints and affidavits, the trial court entered partial judgment for the People, finding that CCB had, among other things, "'repeatedly and persistently' engaged in fraud, deception and false advertising in connection with its credit card solicitations." Pet. App. 6a.

The trial court permanently enjoined CCB, as relevant here, "from engaging in future fraud, deception, and false advertising with respect to: credit

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6. In fact, late fees could be imposed and collection calls made in the usual circumstances: payment past due, account over-limit, or depletion of the savings account securing the card. *See* Supplemental Appendix 5a-6a.

7. The trial court sustained CCB's statute of limitations and res judicata defenses to a portion of the People's claims. Pet. App. 5a-6a.

limits, initially-available credit, [and] late fees and collection calls concerning secured credit card accounts." Pet. App. 6a-7a. The court also enjoined CCB from automatically enrolling consumers in a third-party membership benefit program without their express consent. Pet. App. 7a.

The trial court's liability and injunctive order were affirmed on appeal, including its rejection of CCB's TILA preemption defense. Pet. App. 7a, 51a-59a. In rejecting CCB's argument that its solicitations as of mid-2001 corrected any problems as to credit limits, the Appellate Division found that a reasonable consumer would still be misled into "believing that the 'up to' amount boldly displayed on the solicitation letter was representative of a likely amount that a consumer would receive," and that "at all times, it appeared that the confusion was purposefully fostered by [CCB's] telemarketers." Pet. App. 56a.[8]

On January 19, 2006, the trial court entered an order granting restitution and penalties. Pet. App. 7a. The Appellate Division affirmed the remedial order in part, and reversed in part. Pet. App. 7a, 59a; *People v. Applied Card Sys., Inc.*, 41 A.D.3d 4 (2007).

4. On June 26, 2008, the New York Court of Appeals affirmed the Appellate Division's orders in their entirety. Pet. App. 1a-29a. Relevant to this petition, the Court of Appeals held that TILA does not preempt the People's fraudulent and deceptive practices claims. The Court of Appeals explained that "New York's Executive Law and

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8. In petitioning for review by this Court, CCB continues to challenge this finding of fact by the state court. *See* Pet. 16.

Consumer Practice Act, collectively, do not require [CCB] to disclose anything," but "simply require that they refrain from fraud, deception, and false advertising when communicating with New York consumers." Pet. App. 10a-11a.

To resolve the preemption question, the Court of Appeals looked to Congress's intent as manifested in the text of the express preemption provision at issue. Pet. App. 8a-17a. The Court of Appeals also considered § 1610(e)'s legislative history and the Board's interpretation of the provision, all of which expressly confirm that § 1610(e) does not preempt state deceptive practices claims. Pet. App. 17a-22a.

Looking first to the text of § 1610(e), the Court of Appeals concluded that § 1610(e) preempts only those state laws that relate to the disclosure of information in credit card solicitations and applications "'subject to the requirements of section 1637(c).'" Pet. App. 10a (quoting 15 U.S.C. § 1610(e)). Preemption is thus "limited . . . to laws that purport to alter the format, content, and manner of the TILA-required disclosures and those that require credit issuers to affirmatively disclose specific credit term information *not embraced by TILA or Regulation Z.*"[9]

9. The Court of Appeals rejected the People's alternative argument that § 1610(e) preempts only those state laws that require disclosure of a credit term for which there exists a specific TILA disclosure requirement. TILA does not currently require that credit card solicitations disclose credit limits or available credit. *See* Pet. App. 21a n.14. Thus, the People argued below that § 1610(e) should not be read to preempt the People's deceptive practices claims involving credit limits or available credit, even if those claims did arguably require disclosure of credit limits or available credit — which they do not.

Pet. App. 10a (emphasis added). In support of this conclusion, the Court of Appeals cited the rulemaking accompanying the FCCCDA amendment to Regulation Z, which explains that "'State laws relating to the terms of credit required to be disclosed or the manner in which such terms must be disclosed are preempted.'" Pet. App. 10a (quoting Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,863). The Court of Appeals also considered the Official Staff Interpretation of § 1610(e), which makes the same point. Pet. App. 10a (citing 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(1)).

Accordingly, the Court held that the fraud and deceptive practices in this case are not preempted, because New York's consumer protection statutes do not require CCB to disclose anything; they "simply require that [CCB] refrain from fraud, deception, and false advertising when communicating with New York consumers." Pet. App. 10a-11a. While the Court of Appeals recognized that the verified petition makes reference to the fact that many consumers were unaware of the manner in which certain credit terms were applied against their accounts, it found determinative the fact that the People did not challenge the substance or sufficiency of CCB's TILA disclosures and obtained no relief based upon consumers' purported lack of awareness. Pet. App. 12a.[10]

The Court of Appeals rejected CCB's argument that § 1610(e)'s preemption of state laws "relating to" the disclosure of information in consumer credit card

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10. CCB's professed compliance with TILA, *see* Pet. 15, is not only irrelevant to this case, but has never been adjudicated.

solicitations requires preemption of "every state law that could potentially touch upon any credit information that [CCB] might choose to include in their credit card applications and solicitations." Pet. App. 10a. The Court of Appeals did not find support for CCB's claim in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-90 (1992), a case involving preemption under the Airline Deregulation Act of 1978 ("ADA"), whose express preemption clause also uses the phrase "relating to" to circumscribe its preemptive scope. Pet. App. 13a-15a. While "relating to" does "'express a broad pre-emptive purpose,'" the Court of Appeals acknowledged, the phrase is not without limit. Pet. App. 13a (quoting *Morales*, 504 U.S. at 383); *see also* Pet. App. 13a (citing *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995); *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 989, 994 (2008)). The Court of Appeals pointed out that this Court has "'cautioned against an "uncritical literalism" that would make preemption turn on "infinite connections,"'" Pet. App. 13a-14a (quoting *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001)), and thus has interpreted the phrase to require "'a connection with, or reference to' the subject-matter set forth in a particular preemption clause." Pet. App. 13a (quoting *Morales*, 504 U.S. at 384). "[N]o preemption occurs," the Court of Appeals added, "if the effect of the relief sought is 'too tenuous, remote or peripheral.'" Pet. App. 14a (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983) (external citation omitted)).

Applying interpretive guidance from *Morales*, *Rowe*, *Travelers*, *Egelhoff*, and *Shaw*, the Court of Appeals concluded that the People's claims do not "relate" to

the disclosure of federally mandated information in credit card solicitations. Pet. App. 13a-16a. "Instead, they relate to the inclusion in these materials of certain fraudulent and deceptive misinformation — none of which is even addressed by the federal disclosure scheme." Pet. App. 14a. The People's claims do not reference or connect with TILA disclosure requirements in part because the People's entitlement to relief is based not on CCB's obligation to disclose credit terms, but on "'a more general obligation — the duty not to deceive.'" Pet. App. 16a (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992)). Moreover, neither the People's claims nor the relief they were granted have any effect on TILA-required disclosures. Pet. App. 15a. The trial court's order did not mandate any alteration of or addition to the required disclosures. Pet. App. 15a. Rather, its injunction simply prevents CCB from affirmatively misrepresenting the nature of credit terms. Pet. App. 15a.

For essentially the same reason, the Court of Appeals held that the People's claims in this case would not disrupt the federal scheme of uniform disclosure mandated under TILA. The Court noted that the relief granted below does not alter or impose any additional disclosure requirements upon CCB; it merely precludes them from making fraudulent and deceptive statements regarding credit terms. Pet. App. 16a-17a. While finding that point dispositive, the Court of Appeals added that any "indirect economic influence" upon CCB's solicitation practices resulting from the relief accorded below is not sufficient to overcome the presumption against preemption of state law. Pet. App. 16a (quoting *Travelers*, 514 U.S. at 664 ("although ERISA contains

a broad, 'relating to' preemption clause," ERISA did not preempt New York law imposing surcharges on all insurers "'because the law did not impose a substantive coverage requirement'")).

The Court of Appeals distinguished the holding in *Morales*, which found the state law at issue preempted by the ADA, based on the particular relationship between the federal and state laws at issue in that case. Pet. App. 14a-15a. The Court of Appeals also rejected CCB's reliance on this Court's decision in *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008), because the scope of preemption under § 1610(e) is substantively different from that under the Medical Device Act at issue in *Riegel*, and because unlike in *Riegel*, the People's claims in this case will not disrupt the federal scheme at issue. *See* Pet. App. 16a-17a.

The Court supported its textual analysis by looking to the legislative history of § 1610(e), through which it confirmed that Congress did not intend TILA to provide the sole protection against fraudulent or deceptive marketing practices, or to preempt state deceptive practices claims in this area. Pet. App. 17a-20a. The Senate Banking Committee Report pointedly states that TILA does not preempt "'the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.'" Pet. App. 20a (quoting S. Rep. No. 100-259, at 9). The Court of Appeals noted that New York's consumer protection laws "comprise, of course, just such a 'mini-FTC act.'" Pet. App. 20a (citing *Oswego*, 85 N.Y.2d at 26; *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 323-24 (2002)).

The House Conference Report also anticipates that States would continue to enforce their unfair and deceptive trade practices acts, and even obtain "a specific disclosure beyond those specified in [§ 1637(c)] in the settlement or adjudication of a specific case or cases." Pet. App. at 19a (quoting H.R. Conf. Rep. No. 100-1069, at 22). The Conference Report explains that § 1610(e) preempts "'State credit and charge card disclosure laws,'" identifying as an example a California statute "contain[ing] application and solicitation disclosure requirements very similar to TILA's." Pet. App. 18a (quoting H.R. Conf. Rep. No. 100-1069, at 22).

After considering the statutory text and its legislative history, the court of appeals gave deference to the views of the Board of Governors of the Federal Reserve System, the agency charged with administering TILA. *See* Pet. App. 20a (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980)). The Board's views confirmed the Court of Appeals' statutory analysis, and mirrored the views of the Senate Banking Committee and House Conference Reports. The Board's rulemaking accompanying its revisions to Regulation Z provide that "'any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") . . . are not preempted.'" Pet. App. 20a (quoting Truth in Lending; Credit and Charge Card Disclosures, 54 Fed. Reg. at 13,864). The Board's Official Staff Interpretations state the same: "'[S]tate laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted.'" Pet. App. 20a (quoting 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3)).

The single dissenting judge would have found the People's deceptive solicitation claims preempted by TILA. First, the dissent mistakenly described the majority opinion as limiting preemption to circumstances in which a specific TILA disclosure requirement governs the credit term alleged to be deceptive. *See* Pet. App. 30a, 39a-40a & n.2, 47a-48a. The dissent equates the majority's view with conflict preemption, Pet. App. 30a, 40a, 48a, apparently believing that the majority found no preemption in this case because TILA does not require disclosures for credit limits or available credit, Pet. App. 39a n.2. In this respect, the dissent is simply mistaken, as the majority actually held that preemption is "limited to [state] laws that purport to alter the format, content, and manner of the TILA-required disclosures *and those that require credit issuers to affirmatively disclose specific credit term information not embraced by TILA or Regulation Z.*" Pet. App. 10a (emphasis added).

The dissent's primary point of contention, however, was with the majority's interpretation of the phrase "relating to" in § 1610(e). *See* Pet. App. 47a-48a (citing *Morales*, 504 U.S. at 383). The dissent would have found, for purposes of TILA's special preemption rule, that a negative duty to refrain from making a deceptive or fraudulent statement regarding a term of credit "relates to" an affirmative obligation to disclose that credit term because, in the dissent's view, additional or different disclosures are the sole remedy for deceptive or fraudulent credit card solicitations. *See* Pet. App. 45a-46a, 48a-49a. For this reason, the dissent would have found the federal scheme for enhanced credit shopping disrupted by the People's deceptive practices claims,

and the People's claims preempted. *See* 47a-49a (citing *Riegel*, 128 S. Ct. at 1008).

The dissent dismissed the majority's reliance on the regulatory and legislative materials that demonstrate Congress's intent to leave undisturbed state deceptive practices acts. Pet. App. 42a-45a. Specifically, the dissent asserted that the relied-upon language in the Board's rulemaking was taken out of context and was meant to apply "*solely* in the context of enforcing TILA and Regulation Z." Pet. App. 43a (emphasis in original). The portion of the rulemaking quoted and emphasized by the dissent provides: "'*Finally, state laws regarding the enforcement of the requirements of section 127(c) or (d) or of any prohibitions against unfair and deceptive acts or practices (such as state "mini-FTC acts") also are not preempted.*'" Pet. App. 43a (quoting 54 Fed. Reg. at 13,863-64) (emphasis added in dissenting opinion). The dissent also relied on the House Conference Report and cited the Official Staff Interpretations, without explaining or even mentioning the Senate Banking Committee Report. *See* Pet. App. 43a.[11]

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11. The Senate Banking Committee Report does not mention TILA enforcement, simply stating that § 1610(e) "applies to State credit card disclosure laws, not to general disclosure statutes such as State retail installment sales acts and State plain language statutes. *Nor does it apply to the use of State mini-Federal Trade Commission statutes to address unfair or deceptive acts or practices.*" S. Rep. No. 100-259, at 9 (emphasis added).

REASONS FOR DENYING THE PETITION

The New York Court of Appeals' ruling that TILA does not preempt the People's deceptive practices claims against CCB presents no issues worthy of this Court's review. The Court of Appeals broke no new ground in its decision, but rather applied well-established preemption principles to determine the effect of a straightforward preemption clause. CCB points to no conflict with any federal or state court, which is not surprising considering that both the legislative history of the FCCCDA and the federal agency charged with administering TILA expressly contemplate the use of state deceptive practices laws to prohibit fraudulent and deceptive solicitations by credit card companies.

Nor does CCB's desire for uniform credit card disclosures provide any additional ground for review. The deceptive practices claims brought under state law in this case could equally have been brought by the People under the FTC Act, which is not displaced by TILA, nor does CCB claim that it is. Thus, state laws against deceptive practices do not introduce any threat to uniformity that is not already presented by the FTC Act.

CCB simply disagrees with the outcome of this case, and seeks no more than error correction, but even this has no merit.

1. CCB first argues that this Court should grant review because the Court of Appeals ignored this Court's holdings regarding preemption. But contrary to CCB's argument, the Court of Appeals' decision does not

contradict this Court's holdings. The Court of Appeals faithfully followed this Court's precedents in determining whether and to what extent Congress intended to preempt state law, *see* Pet. App. 8a-12a, and carefully analyzed the pertinent federal and state laws, and the relevant legislative history and regulatory background of TILA.

Far from acting "in derogation of this Court's holdings" regarding preemption, the Court of Appeals carefully explained why the precedents invoked by CCB, notably *Riegel* and *Morales*, do not apply here. Thus, the Court of Appeals explained that the federal statute at issue in *Riegel* (the Medical Device Amendments Act of 1976) was different in critical respects from TILA, thereby leading to a different conclusion on preemption. *See* Pet. App. 16a-17a (discussing *Riegel*, 128 S. Ct. 999). CCB does not identify any specific legal principle in *Riegel* that the Court of Appeals failed to follow, nor could it, since the issues in *Riegel* were heavily case-specific: whether the premarket approval process for medical devices constitutes a federal requirement, and whether common law tort claims can impose state "requirements" applicable to the medical device that are different from the federal requirement. *See Riegel*, 128 S. Ct. at 1006-07. CCB's dispute with the Court of Appeals' treatment of *Riegel* is simply that the court did not find preemption, as the *Riegel* Court did. *See* Pet. 23-25.

Nor did the Court of Appeals "refuse[] to abide by this Court's decisions [such as *Morales*] that have repeatedly held that the phrase 'relating to' in preemption clauses is to be given its broad meaning,"

as CCB asserts. Pet. 30. To the contrary, the Court of Appeals applied this Court's interpretation of the phrase from other statutory contexts, relying on many of the same cases cited in the petition, and applying the "connection with or reference to" standard advocated by CCB. *Compare* Pet. App. 13a-14a, *with* Pet. 30. Again, CCB's complaint is with the outcome: the Court of Appeals found that, "[q]uite simply, [the People's] claims do not relate to the disclosure of federally-mandated information in credit card applications or solicitations." Pet. App. 14a.

Nor does the Court of Appeals' purported reliance on the presumption against presumption, *see* Pet. 25, provide reason for this Court to grant review of the decision below. Although the well-established presumption against preemption was recognized by the Court of Appeals, *see* Pet. App. 8a (citing *Travelers Ins. Co.*, 514 U.S. at 654; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)), the Court of Appeals did not actually rely on the presumption to decide this case. Instead, the Court of Appeals independently reviewed the text of § 1610(e), finding it dispositive that "[the People's] success in this case does not force [CCB] to make any alterations to their section 1637(c) disclosures or to affirmatively disclose any additional credit terms." Pet. App. 16a. Only then did the Court of Appeals comment that "[i]n any event," the presumption against preemption could not be overcome by the "indirect economic influence" CCB cited as resulting from the relief accorded. Pet. App. 16a. The Court of Appeals confirmed its analysis not through a presumption, but by looking to the legislative history of the FCCCDA and the views of the Board of Governors of the Federal

Reserve System, which expressly provide that the FCCCDA does not preempt state deceptive practices laws. Pet. App. 17a-22a. Thus, the Court of Appeals did not "intrude on the regulatory scheme established by Congress" in contravention of any precedents of this Court, as alleged by CCB, *see* Pet. 28, but faithfully followed both congressional intent and the Board's guidance, Pet. App. 20a.[12]

2. CCB's concern that the decision below will "destroy the national uniformity established by TILA," Pet. App. 34, does not merit this Court's review. Contrary to CCB's assertion, there is abundant evidence that an action such as the one here was expressly contemplated by Congress.

As the Court of Appeals correctly held, the legislative history and regulatory background of the FCCCDA confirm that Congress did not intend for TILA to provide a consumer's only protection against fraudulent and deceptive marketing practices in credit and charge card solicitations. *See* Pet. App. 17a-22a. Those materials expressly state that the FCCCDA does not preempt state unfair or deceptive practices laws. *See* S. Rep. No. 100-259, at 9; H.R. Conf. Rep. No. 100-

12. The cases cited by CCB do not support its argument that no presumption against preemption could apply in this case. See Pet. 25 (citing *Lohr*, 518 U.S. at 485; *Rowe*, 128 S. Ct. at 998). This Court, in interpreting the express preemption clause at issue in *Lohr*, expressly relied on the presumption against preemption. *See* 518 U.S. at 485, 494. While *Rowe* did not directly address the question, its analysis suggests that any presumption would have been overcome because the preemption question was not "borderline." *Rowe*, 128 S. Ct. at 998.

1069, at 21; 54 Fed. Reg. at 13,864. Moreover, the deceptive practices claims brought in this case under state law could equally have been brought under the federal FTC Act. *See, e.g., FTC v. Febre*, 1996 U.S. Dist. LEXIS 9487, *7-*11 (N.D. Ill. July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997). It is thus evident that Congress did not regard TILA's goals as inconsistent with state enforcement of laws against deceptive credit card solicitations — whether those laws were enacted by Congress or by the States. The Board, too, has consistently concluded that § 1610(e) does not preempt state unfair or deceptive practices laws.[12]

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13. The independence of disclosure requirements and deceptive practices claims is further confirmed by certain amendments proposed by the Board jointly with two other federal financial regulatory agencies pursuant to their authority under the FTC Act to prevent unfair or deceptive practices. *See* Pet. App. 21a n.14. The proposed rule recognizes that disclosure problems associated with credit cards "'have constituted deceptive practices under applicable standards of the FTC Act.'" Unfair or Deceptive Acts or Practices, 73 Fed. Reg. 28,904, 28,924 n.59 (proposed May 19, 2008) (quoting OCC Advisory Letter 2004-4, at 2-3 (Apr. 28, 2004), *available at* 2004 OCC CB LEXIS 31, at *7). The OCC Advisory Letter cited in the proposed rule explains that

> [i]n addition to complying with the technical disclosure and other requirements of [TILA] and the Truth in Savings Act, issuers of these [credit card] products must be careful to ensure that their marketing solicitations, disclosure documents, and other materials provided to consumers do not violate the FTC Act's prohibition against unfair or deceptive acts or practices.

OCC Advisory Letter 2004-4, at 4, 2004 OCC CB LEXIS 31, at *10.

Moreover, Congress has specifically authorized States to enforce TILA's disclosure requirements, thus evincing no concern over state enforcement generally. The only thing a State may not do in this area is to impose an affirmative disclosure requirement, which New York has not done.

3. CCB's petition rests at bottom on two fundamental mistakes. First, CCB mistakenly reads the decision of the Court of Appeals as imposing a regime of conflict preemption only, when in fact the Court found preemption not only of conflicting state laws but also of all affirmative disclosure requirements, even in the absence of actual conflict. CCB asserts that under the Court of Appeals' ruling, "when the Federal Reserve Board has not mandated a particular disclosure, the States to [sic] are free to supplement TILA's requirements until such a time as the Federal Reserve Board, in fact, does act." Pet. 32-33. In fact, however, the Court of Appeals actually held that § 1610(e) preempts both "laws that purport to alter the format, content, and manner of the TILA-required disclosures *and those that require credit issuers to affirmatively disclose specific credit card information not embraced by TILA or Regulation Z*." Pet. App. 10a (emphasis added).

Second and more fundamentally, CCB ignores or overlooks the inherent distinction between a disclosure requirement and a prohibition against fraudulent statements. The bank mistakenly assumes that the only remedy for a fraudulent or deceptive solicitation is additional or different disclosures, and argues that a deceptive practices claim is therefore tantamount to a

disclosure requirement, when the facts of this case reveal that not to be the case.

For example, CCB's solicitation for its secured card is fraudulent and deceptive in that it expressly states at the top, in bold, that no late fees will be charged or collection calls made when in fact, late fees are charged and collection calls made. Lower down on the solicitation, in fine print, the existence of fees and the practice of making collection calls is revealed, but the trial court found and the appellate court affirmed that a reasonable consumer would expect to receive a card with no fees and no collection calls.[14] CCB failed to provide that.

The deceptive practices claim is not a disclosure requirement at all, but simply a requirement that the Bank provide consumers what it promised them. By this claim the People ask the Bank either to stop promising no fees and collection calls, or to stop imposing fees and making calls. And if the Bank chooses to change its solicitation rather than its practices, the Bank is not required to add any new disclosures, but only to delete the false or deceptive statements. The Board commentary explains this point. The Official Staff Interpretations provides that "state laws regulating the terms of credit and charge card accounts are not

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14. The standard for deception under New York law is "an objective standard which asks whether the 'representation or omission [was] likely to mislead a reasonable consumer acting reasonably under the circumstances.'" *Matter of Food Parade, Inc. v. Office of Consumer Affairs*, 7 N.Y.3d 568, 575 (2006) (citing *Gaidon v. Guardian Life Ins. Co. of Am.*, 94 N.Y.2d 330, 344 (1999) (internal quotation marks and citations omitted).

preempted, ... and state laws prohibiting unfair or deceptive acts or practices concerning credit and charge card applications, solicitations and renewals are not preempted." 12 C.F.R. pt. 226, supplement I, ¶ 28(d)(3); *see also* 54 Fed. Reg. at 13,864 (same).

CCB attempts to explain away the unanimous conclusion of the Senate Banking Committee, the House Conference Report, and the Board that § 1610(e) does not preempt state deceptive practices laws by suggesting that such laws are outside the preemption bar only when they are used to enforce the requirements of TILA and Regulation Z. Pet. 32. This view was adopted by the dissent below. *See* Pet. App. 42a-43a. It is, however, inconsistent with both the text and purpose of the legislative and regulatory materials at issue, which expressly exempt state deceptive practices laws from preemption, without any such limitation. *See supra* at 3-6.

In sum, the decision below applies settled preemption principles in a straightforward and correct manner, and presents no issues meriting this Court's review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

N.Y. General Business Law § 349

Deceptive acts and practices unlawful

(a) Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

(b) Whenever the attorney general shall believe from evidence satisfactory to him that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he may bring an action in the name and on behalf of the people of the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices. In such action preliminary relief may be granted under article sixty-three of the civil practice law and rules.

(c) Before any violation of this section is sought to be enjoined, the attorney general shall be required to give the person against whom such proceeding is contemplated notice by certified mail and an opportunity to show in writing within five business days after receipt of notice why proceedings should not be instituted against him, unless the attorney general shall find, in any case in which he seeks preliminary relief, that to give such notice and opportunity is not in the public interest.

(d) In any such action it shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.

(e) Nothing in this section shall apply to any television or radio broadcasting station or to any publisher or printer of a newspaper, magazine or other form of printed advertising, who broadcasts, publishes, or prints the advertisement.

(f) In connection with any proposed proceeding under this section, the attorney general is authorized to take proof and make a determination of the relevant facts, and to issue subpoenas in accordance with the civil practice law and rules.

(g) This section shall apply to all deceptive acts or practices declared to be unlawful, whether or not subject to any other law of this state, and shall not supersede, amend or repeal any other law of this state under which the attorney general is authorized to take any action or conduct any inquiry.

(h) In addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this

section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated this section. The court may award reasonable attorney's fees to a prevailing plaintiff.

N.Y. General Business Law § 350.

False advertising unlawful

False advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful.

N.Y. Executive Law § 63(12)

Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of

section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person.

In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section.

5a

Supplemental Appendix

☑ SECURED GOLD CARD ONLINE APPLICATION

TERMS AND CONDITIONS OF OFFER

Annual Percentage Rate (APR) for Purchases	[redacted]
Other APRs	Cash Advance APR: [redacted] Late Payer APR: [redacted] see explanation [redacted] below
Variable-Rate Information	Your APR may vary. The APR for purchases and Cash Advances is determined by adding [redacted] to the Prime Rate (but not lower than 9.99%). The Late Payer APR for both purchases and Cash Advances is determined by adding [redacted] to the Prime Rate (but not lower than 9.99%).
Grace Period for Repayment of Balances for Purchases	[redacted]
Method of Computing the Balance for Purchases	[redacted] Average Daily Balance (including new purchases)
Monthly Maintenance Fee	[redacted] month ($2.00 Quarterly)
Minimum Finance Charge	[redacted] .50
Account Origination Fee (one-time fee)	[redacted]

Cash Advance Fee: the greater of $5.00 or 5% of each Cash Advance which includes, but is not limited to, ATM and convenience check usage; Late Payment Fee: $[redacted]5 if your credit limit is greater than $1,000, [redacted] or $35 if your credit limit is greater than $1,000. If any minimum payment is not received by the last day of the billing cycle in which it was due then the late payer rate applies and will be effective beginning the first day of the next billing cycle.

*The Prime Rate used in determining the variable APRs is the highest one reported in the "Money Rates" column of The Wall Street Journal on the last business day of the month. Variable APRs are based on the 4.25% Prime Rate as of January 31, 2003.

The information concerning the costs of credit is accurate as of February 20, 2003. This information may have changed after that date. To find out what may have changed, write to us at Cross Country Bank, Correspondence Department, P.O. Box 310711, Boca Raton, FL 33431-0711.

Approval and Credit Limit Terms: By submitting your application and money you are requesting a Secured Visa® Gold account ("Account") and a Statement Savings account ("Deposit"). Your Account will have an initial credit limit that is at least equal to the amount of money in your Deposit. An Account and Deposit may be approved if CCB can verify your information, you meet our criteria bearing on creditworthiness, your deposit is not returned unpaid, you are at least 18 years old, you live in the 50 United States or the District of Columbia, you submit a completed application, you have not requested credit from CCB in the past six months, and you do not have a CCB credit account.

Statement Savings Account Information and Disclosures: You are required to submit money in U.S. Dollars in order to open a Deposit, which will act as Cross Country Bank's security deposit for the Account. The interest rate on the Deposit is 3.00% with an ANNUAL PERCENTAGE YIELD* ("APY") of 3.04%. The APY is accurate as of February 20, 2003, however, the rate may change after the Deposit is opened at our discretion. Interest will be compounded monthly and credited monthly. If you close your Deposit before interest is credited you will not receive the accrued interest. Interest is calculated using the average daily balance method, which applies a periodic rate to the average daily balance in the Deposit for the period. Interest begins to accrue no later than the business day we receive credit for deposits made. The minimum balance required to open the Deposit is $200. Fees could reduce the earnings on the deposit. You may not access Deposit funds as they are used to determine your credit limit and/or serve as collateral for your Account. The Deposit will be owned jointly with the right to survivorship if more than one person applied for the Deposit and related Account. You will be sent Deposit statements not less than quarterly. We will promptly return your funds if a Deposit is not opened for any reason. MEMBER FDIC

Pledge And Assignment Of Statement Savings Account: By submitting your application and money, you authorize CCB to open a Deposit in your name as collateral for the Account, if approved. In consideration of CCB's agreement to establish an Account for your use, you hereby pledge and assign and grant CCB a security interest in the Deposit and any sums you may later add to the Deposit to us, including interest you earn to secure payment of all obligations on the Account. This means your Deposit secures all sums you [redacted] owe us on [redacted] your credit account. You understand that the Deposit is subject to the Deposit agreement and the Security section of the Account agreement and other documentation that will be sent to you. Further, you understand that the Deposit must remain with CCB as long as it secures your Account, that CCB need not permit any withdrawals from the Deposit and that if you

BEST AVAILABLE COPY

Supplemental Appendix

Notice: This application to establish a credit card account ("Account") and statement savings account ("Deposit") is made available by Cross Country Bank of Wilmington, DE ("CCB"). If you accept or use an Account, you do so subject to the terms of this application and the CCB Credit Card Agreement and Statement Savings Account Rules and Regulations, as they may be amended, which will be sent to you ("Agreement"). **The Agreement and terms of your accounts, including the APR, are subject to change. The Agreement includes a binding arbitration provision, which may replace your right to go to court, including the right to a jury and the right to participate in a class action or similar proceeding.** Any changes that you make to the application will have no effect. This offer, and any resulting Account or Deposit, is subject to Delaware and federal law. **You agree that:** You will be responsible for and pay for all charges and fees incurred on any account granted according to the Agreement, all statements made and information provided are true; CCB, its affiliates and service or marketing vendors may monitor and/or record any conversations with you; your Account will only be used for personal, family or household purposes; CCB is authorized to verify all information you provide; CCB may obtain consumer credit reports related to this request for credit and for updates, renewals, extensions of credit and review or collection of your Account; CCB is authorized to furnish information about you and your Account to consumer reporting agencies and others who help service your account. Upon request, CCB will tell you the name and address of each consumer credit reporting agency from which we obtained a consumer credit report about you.

fail to make any payments on your Account when they come due we may apply the Deposit to pay all that you owe on your Account without notice. This pledge and assignment shall be governed by Delaware Law.

* APY (Annual Percentage Yield) is the effective interest rate your money will earn if it remains on deposit for a full year at the same annual interest rate, and if all of the principal and interest are left in the Deposit.

New York Residents: May contact the New York State Banking Department at 1-800-518-8866 to obtain a comparative listing of credit card rates, fees and grace periods. **Ohio Residents:** The Ohio law against discrimination requires that all creditors make credit equally available to all credit worthy customers, and that credit reporting agencies maintain separate credit histories on each individual upon request. The Ohio civil rights commission administers compliance with this law. **California Residents:** Married applicants may apply for separate credit. **Married Wisconsin Residents:** No provision of any marital property agreement, unilateral agreement or court order applying to marital property will adversely affect a creditor's interests unless prior to the time credit is granted, the creditor is furnished with a copy of the agreement, statement or court order or has actual knowledge of the provision. Married Wisconsin residents must furnish the name and address of your spouse to Cross Country Bank, Correspondence Department, P.O. Box 310711, Boca Raton, FL 33431-0711.

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Return to Application

©2003 Cross Country Bank
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Equal Opportunity Lender